BOSE NI MOMO TRUST

BA PROVINCE

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2013 CONSTITUTION PROVIDES BEST EVER PROTECTION OF ITAUKEI AND ROTUMAN CUSTOMARY RIGHTS

Let me begin by providing you at the outset with a summary of the main findings of an academic research which I conducted in order to determine the objective truth about the adequacy and effectiveness of the protection under the 2013 Constitution of iTaukei and Rotuman customary rights to their communal lands and natural resources.

The research covered two comparative studies focusing on the historical facts and developments in law in relation to the protection of the collective rights of indigenous peoples.

The first was a comparison of the protection of indigenous land rights in Fiji and in four other countries that were also colonized by Great Britain, namely New Zealand, Australia, the United States of America and Canada. The purpose is to find out how is it that today the iTaukei and Rotumans still hold as their customary lands 91% of all lands in Fiji whereas in the other four States the indigenous peoples have been dispossessed of their customary lands to the point where in New Zealand, for example, the Maori people today are left with only 6% of all lands in that country. The finding of this first comparative study is that the iTaukei and Rotumans are in effective occupation and possession of 91% of all lands in Fiji because contrary to what happened in the other four British colonies, here from the outset of its colonial administration from the Deed of Cession of 10th October 1874, Britain pursued a policy of benevolent protection of the iTaukei and Rotumans. In fact, with the support of Britain's first resident Governor, Sir Arthur Gordon, the Council of Chiefs at its meeting in Bua in 1879 laid the foundation of customary land policies that are still in force today.

The second study covered a comparison of the effectiveness of the protection of iTaukei and Rotuman rights to their customary lands and resources in the 1970 and 1987 Constitutions, on the one hand, and on the other, the 2013 Constitution. Here, the finding is that the 2013 Constitution provides the best ever legal protection of indigenous rights to customary lands and natural resources not only when compared to the 1970 and 1997 Constitutions but also the protection of indigenous land rights in the other four States.

So, what is so special and exceptional about the protection of iTaukei and Rotuman customary land ownership rights in the 2013 Constitution?

First of all, by providing for this protection under section 28 as part of the 2013 Constitution's Bill of Rights, all branches of government, including Parliament, the Executive and the Judiciary, and every person performing public functions, are bound by section 6 to "respect, protect, promote and fulfil" these indigenous rights as well as the fundamental rights and freedoms of all individual persons as set out in the Bill of Rights. And further, because the 2013 Constitution is the supreme law of Fiji, Parliament cannot do what Parliaments have done in New Zealand and Australia under their constitutional doctrine of the sovereignty of Parliament, such as, for example, the NZ Parliament enacting the Foreshore and Seabed Act in 2004 unilaterally extinguishing all Maori rights to their customary fisheries, or the Australian Federal Parliament amending the 1993 Native Title Act in 1998 intentionally to reduce the grounds upon which the Aborigines and Torres Strait Islander people could reclaim customary lands taken from their ancestors.

Secondly, by providing for the protection of iTaukei and Rotuman rights to their customary lands and resources in the Bill of Rights, the 2013 Constitution has also conferred upon Government, both expressly and implicitly, an in-trust duty to consult the iTaukei and Rotumans on issues of concern to them as customary land and resource owners, and especially now as Government has interposed itself under the Land Use Decree as the landlord in leasing out iTaukei lands. In this legal capacity Government is required under section 11 of that Decree "to take into consideration at all times the best interest of the landowners and the overall wellbeing of the economy". For the indigenous land and resource owners this fiduciary duty conferred upon Government gives them the opportunity to approach Government and to establish with it, and in particular with the Hon Prime Minister as Minister for Itaukei Affairs, the Hon Minister for Lands and Mineral Resources, and the Hon Minister for Forestry and Fisheries, a regular annual meeting where issues of continuing concern to the land and resource owners can be raised and discussed, and their views taken into account by Government when formulating its policies on these issues. I stress that the sole focus at this ministerial-level consultation is on issues of continuing concern to the Itaukei and Rotumans as customary lands and resources owners, such as, for example,

--the duration of leases and other terms under the Land Use Decree, which would give the landowners a fair return but at the same time safeguard the paramountcy of ensuring that every Mataqali has sufficient land for the maintenance of its members,

--concerns about the Surfing Decree,

--the need for a clear understanding on the share of landowners to royalties from minerals mining and extraction of underground water,

--the need for a clear understanding as to who is responsible for the rehabilitation of land and the environment after the extraction of minerals from surface and open-cut mining on iTaukei land, such as mining for gold at Vatukoula and Tuvatu, bauxite mining in Bua and copper mining in Namosi,

--clarification as to who precisely must bear responsibility for compensating ALTA tenants on Itaukei land for agreed improvements like family homes and farm buildings when the lease expires and the land is needed by the Mataqali to be returned in order to meet the maintenance needs of its own members,

--progress in the implementation of long-standing government policies on the transfer to the landowners of Government developed pine and mahogany plantations and landowner participation in associated secondary activities like log harvesting, transportation, processing, and forest replanting, and

--the availability of the $10 million in support fund promised by Government in its Budget to assist landowners in the survey and subdivision of their lands for on-leasing by Government under the Land Use Decree.

You will see that, from their nature, all these issues are concerned with fundamental Government policies and are different from issues of community economic and social development, funded by Government, in each of the 14 Provinces and Rotuma, which are normally reviewed and discussed with Government officials at meetings of Provincial Councils.

Let me now explain the findings of the two comparative research studies in detail.

As I have stated, the first research study was to compare the history of the protection iTaukei and Rotuman customary ownership of their communal lands and resources from the outset of British colonization in 1874 to what happened to indigenous peoples and their lands and resources in four other countries which were also colonized by Great Britain. These are the Maoris in New Zealand, the Aborigines and Torres Strait Islander peoples in Australia, the American Indian tribes in mainland United States of America, and the Indian tribes or First Nation peoples of Canada.

The second comparative study was then to compare the effectiveness of the **legal protection** of Itaukei and Rotuman customary rights to their communal lands and natural resources under the 2013 Constitution with the **political protection** of Itaukei and Rotuman customary rights under the 1970 and 1997 Constitutions.

On the first comparative study, because of time constraints, I shall confine my presentation to giving you a summary of what happened to the protection of indigenous land rights in New Zealand and Fiji.

Both countries were colonized by Great Britain.

In 1840, the Chiefs of about 26 Maori tribes ceded sovereignty over Aotearoa to the British Crown in a cession treaty called the Treaty of Waitangi. Through this Treaty the British Crown took ownership of all lands in New Zealand as Crown land. But there was an exception. Under the English common law doctrine of native or aboriginal title, Britain recognized continuing Maori customary ownership of lands in their actual use and occupation according to their customs and tradition.

In 1874, Ratu Seru Cakobau and other High Chiefs ceded sovereignty over their islands they called "Viti" to the British Crown in the Deed of Cession of 10th October 1874. The Chiefs of Rotuma did the same in their Deed of Cession with Britain in 1879. The terms of the two Deeds of Cessions were remarkably similar to those of the Treaty of Waitangi in New Zealand. Sovereignty over "Viti kei Rotuma" passed on to Great Britain. Britain acquired ownership of all lands and territories as Crown land. But, again, as in New Zealand, there was an exception. Britain expressly recognized in accordance with the English common law doctrine of native title the continuing customary ownership by the chiefs and their tribes of lands in their actual use and occupation according to their customs and traditions. Furthermore, the Deed of Cession of 10th October 1874 also expressly recognized the rights of the ceding High Chiefs within Britain's sovereignty and its government of Fiji.

From this common and shared history of proclamation of British sovereignty over New Zealand and Fiji, and the recognition in both countries of the common law rights of the Maoris and the Itaukei and Rotumans to their customary lands and territories, consider then the present situation in NZ and Fiji.

In NZ today, the Maories make up only 15% of the total population of the country. And customary lands still in the possession of the Maoris have been reduced to less than 6% of all lands in NZ today. Further, the Maoris have lost all their rights to their customary **qoliqoli or foreshore and coastal fisheries and other marine resources.** By stark contrast, in Fiji today, the Itaukei and Rotumans together comprise about 60% of Fiji's total population and they still own as their customary lands 91% of all lands in Fiji together with their traditional and customary **qoliqoli in foreshore and coastal areas**.

Now, how did this difference in customary land possession and associated coastal fisheries rights come about?

In NZ, successive colonial governments were dominated by European settlers from Britain and Europe. They enacted laws in Parliament to enable the transfer of Crown land as radical freehold titles to individual settlers and farmers or organisations as their permanent private property. But each time Parliament formalizes a transfer of Crown land, there is a corresponding extinguishment of underlying native title to that Crown land. This explains the massive and tragic loss by the Maories of their customary lands.

I should mention though that Maori Tribes who have lost their tribal lands have been able to claim compensation from the State of New Zealand under the Treaty of Waitangi Act of 1975. Through inquiries and recommendations by the Treaty of Waitangi Tribunal, the NZ Parliament has, for example, enacted enabling legislation for the payment of compensation to Maori tribes who were dispossessed of their tribal land. A very good example of this compensatory process is the Ngai Tahu Maori tribe in the South Island of New Zealand. The total package of compensation to the Ngai Tahu Trust comprised NZ$170 for lost tribal lands and another NZ$70 million for lost customary fisheries. The Ngai Tahu Trust has invested this combined compensation of NZ$240 million through its investment holding company. Today, the total assets from these investments are worth close to NZ$1 billion. These investments have enabled the Ngai Tahu Trust to fulfil the tribe's fiduciary obligations both to generations past and those in the future, and to the present generation of tribal members. They have lost their tribal lands. Many of them still feel deeply aggrieved that the money they received was but a small fraction of the real value of the lands they have permanently lost. However, through their investment of the compensation funds they received, they have built up their tribal commercial assets. And through these, the Ngai Tahu Trust has been able, very successfully, to maintain their in-trust duty to their tribal members, both present and in the future.

Against this experience of the Maoris in New Zealand, consider how doubly blessed the iTaukei land and resources owners are in Fiji. You still retain full customary ownership of your communal lands. But, like the Ngai Tahu Trust and its investment company, you can invest rent income from the on-leasing of your surplus Mataqali lands for the benefit of your members in perpetuity.

We consider now the question: what was it that happened historically in Fiji to explain how the Taukei and Rotumans today are still in possession by custom of 91% of all lands in our country?

The answer is a deeply moving story. It is recorded in a book, *The Charter of the Land* [Oxford University Press 1969], researched and written by Dr Peter France, who had served in Fiji in the 1950s and 1960s in the British Colonial Service as District Officer, Divisional Commissioner and the Secretary for Fijian Affairs.

According to Dr France, when Britain's first resident Governor arrived at Levuka, Sir Arthur Gordon brought with him firm instructions from the Colonial Office in London. The Governor was directed by the Secretary of State to devise a system of land administration in Fiji "with a view of disturbing as little as possible of the existing tenure". Sir Arthur Gordon himself came with a strong personal belief that "The continued existence of the Fijian race was dependent on the preservation of their traditions against the corrupting influences of the (European) planter community". He was imbued with a strong sense of social justice to protect Fijians against the "unenlightened self-interests of the trading classes".

Up to the time of the Deed of Cession in 1874, the Chiefs administered their own respective "Vanuas" and alienation of land was quite frequent among the Fijians themselves. Sir Arthur Gordon sought to centralize the administration of native affairs. He made himself a chief among chiefs, established the Council of Chiefs as the apex body of native administration made up of village, district and provincial councils, and appointed chiefs into the government's administrative service. He succeeded in getting the Council of Chiefs to agree on a set of native regulations which would establish a uniform code of customs, and regulating councils, native courts, marriages and divorce, planting of gardens, prevention of fire, registration of births and deaths, public health standards and maintenance of social stability. Most crucial of all, with Governor Sir Arthur Gordon's support, the Council of Chiefs, at its meeting in Bua in 1879, agreed on a centralized and standardized system of customary land tenure. The main elements were:

- That there shall be but one custom for all native lands in Fiji,
- That the "true and real ownership" of all native lands would vest in the Mataqali alone,
- That it is neither possible nor lawful for any Mataqali to alienate its land,
- That all men should be registered in their Mataqali together with their lands,
- That the register should be approved by tikinas and provincial councils, and
- That the register shall be proof "for all time" as to the status and possession of customary lands held by each Mataqali in each Province.

By the time the Land Claims Commission met following its establishment under the Land Claims Ordinance 1879, native land policy and the foundation of native administration through provincial and tikina councils had been laid.

So today, if the iTaukei and Rotumans celebrate the facts that they still own 91% of all lands in Fiji as their customary lands, and that their right of self-determination to govern their communities through their own provincial, tikina and village councils has long been established, it is the British Government and the Council of Chiefs that we ought to pay homage to, for their wisdom in the foundations they laid all the way back in 1879.

Now, we come to the second comparative study. This is the protection of iTaukei and Rotuman customary lands and natural resources in Fiji's own Constitutions following independence from Great Britain in 1970.

Under the 1970 and 1997 Constitutions, provisions for indigenous customary rights to their communal lands and natural resources, and for indigenous self-administration through provincial and tikina councils, were essentially through specific legislation such as the Native Lands Act, Rotuma Lands Act, Native Lands Trust Act, Fijian Affairs Act and the Rotuma Act.

Section 3 of the Native Lands Act, for example, provided that: "Native lands shall be held by native Fijians according to native custom as evidenced by usage and tradition".

Under both the 1970 and 1997 Constitutions, all these statutes on indigenous rights were to be protected by entrenched voting procedures in Parliament. The most important of these was that any amendment to any of these statutes must be supported by at least 9 of the 14 members of the Senate appointed by the Council of Chiefs. What this in effect meant was that it was for the iTaukei and Rotuman peoples themselves to protect their customary rights through their own representatives in Parliament, and in particular through the Council of Chief's nominees in the Senate.

In stark contrast to this, we consider now the protection of iTaukei and Rotuman customary rights to their communal lands and natural resources and their collective right to self-determination under the 2013 Constitution. A summary is as follows:

1. Under section 173-(1) all individual statutes on iTaukei and Rotuman rights, as listed above, shall continue in force.
2. The Preamble expressly recognises the iTaukei and Rotumans as Fiji's indigenous peoples, together with their customary ownership of their communal lands, and their culture, customs, traditions and language.
3. Most important of all, section 28 in the Bill of Rights provides that ownership of all Itaukei and Rotuman lands shall remain with the customary owners of that land, that all such customary land shall not be permanently alienated, that if customary land is to be compulsory acquired by the State for a public purpose, just and equitable compensation shall be paid to those customary owners, and that if acquired land is no longer needed for the public purpose, it shall revert to the customary owners.

From this comparison, it is evidently clear that the 2013 Constitution provides the strongest ever protection of indigenous iTaukei and Rotuman rights. In fact, by incorporating the protection of iTaukei and Rotuman customary rights to their communal lands and natural resources in the 2013 Constitution under section 28 as part of the Bill of Rights, the Constitution, as Fiji's supreme law, has done the following in their favour:

1. Firstly, it has legitimated the grant of special collective rights to the iTaukei and Rotumans, as Fiji's indigenous peoples, that is not accorded to the other ethnic and cultural communities in Fiji.
2. Secondly, it has under section 6 conferred upon all branches of government in Fiji, ie, Parliament, the Executive and the Judiciary, and every person performing the functions of any public office [eg, State officials, officers of the NLTB and other statutory bodies and authorities], a clear obligation "to respect, protect, promote and fulfil" this collective right. This means, for example, that in Fiji the Executive and Parliament cannot do what the Executive and Parliament have done in New Zealand and Australia under their constitutional doctrine of the sovereignty of Parliament. In New Zealand, the Executive and Parliament, under a Labour Government majority and without consulting the Maori people, enacted in 2004 the Foreshore and Seabed Act unilaterally abolishing Maori customary rights to their traditional coastal and foreshore fisheries. In 1998 the Australian Federal Parliament, with a Liberal-National Coalition majority, enacted an amendment to the Native Titles Act of 1993 with the deliberate intention of reducing the grounds upon which Aboriginal tribes and Torres Strait islanders could submit claims in the federal courts for the restitution of tribal lands unlawfully taken from them.
3. Thirdly, it has empowered Fiji's superior courts and specifically under sections 2, 6, 16, 44 and 97, and under the common law doctrine of the constitution's "Basic Structure", to protect this collective right and individual-based human rights enumerated in the Bill of Rights, as the guardian of the Constitution, the rule of law and administrative justice.

In addition to all these, it can also be said that by the 2013 Constitution expressly recognizing in its Preamble the status and customary rights of the iTaukei and Rotumans as Fiji's indigenous peoples, the State of Fiji is also acknowledging its obligations under international law to accord to them the collective rights granted to indigenous peoples in international conventions and declarations which Fiji has supported as a member State of the United Nations, such as the 2007 UN Declaration on the Rights of Indigenous Peoples, or has signed/acceded to, and ratified as a State party, such as the 1989 ILO Convention 169 on the Rights of Indigenous and Tribal Peoples within Independent States. These rights include the right of indigenous communities to be consulted and to be heard on matters of concern to them in relation to their customary lands and resources, their self-administration through their traditional councils, and the maintenance and revitalization of their languages, culture and customs.

To conclude, I refer again to my earlier suggestion that this august body, the Bose Ni Momo, as the representative trust of customary land and resource owners in this chiefly Province in Ba, the largest Province in Fiji, set the example and precedent for the other Provinces and Rotuma, and seek an audience with the Honourable Prime Minister, in the traditional manner. The purpose is to request the Prime Minister for the establishment directly under him as the

Minister for iTaukei Affairs of regular annual consultations between Government and representatives of indigenous land and resource owners. These annual consultations are to discuss policy issues of concern to the land and resource owners such as those I had enumerated earlier.

To assist you in reflecting on this suggestion, let me cite some examples both in the Constitution and in particular statutes of express and implied provisions that confer upon Government a fiduciary or in-trust duty to consult with customary land and resource owners.

Of immediate relevance here is the Land Use Decree. Section 6(2) of the Decree expressly states that the power of the Prime Minister under section 10 to grant leases of up to 99 years is discretionary, and in exercising this power he is required under section 11 "to take into consideration at all times the best interest of the land owners and the overall wellbeing of the economy". There is clear inference here that in exercising his discretionary power and taking into consideration "the best interest of the land owners---" the Prime Minister must act in good faith and with transparency, and hence the fiduciary or in-trust duty to consult with the customary owners beforehand.

In the 2013 Constitution itself, the following are examples of provisions in which there is an implied duty on Government to consult fully with the customary land owers:

--Under section 27, the Government may compulsorily acquire land necessary for a public purpose. This is a discretionary power, not an absolute right conferred upon Government. Further, Government is under constitutional duty to ensure that there is no hardship to the land owner/s and that just and fair compensation is paid.

--Sections 28(2) and (4) state that iTaukei and Rotuman land acquired for a public purpose shall revert to the customary owners if the land is no longer required by the State. This implies that the State recognizes that the customary owners have a continuing or residual proprietory interest in the land, and hence the State's good faith duty to return the land when it is no longer needed by the State.

--Section 30 recognises the right of landowners to fair share of royalties for extraction of minerals. Section 30(1) vests ownership of minerals under any land or water on the State. However, the owners of customary land and registered customary fishing rights shall be entitled to receive a fair share of royalties or other money paid to the State in respect of the grant by the State of rights to extract minerals from that land or the seabed in the area of thse fishing rights. Under section 30(2), any written law to determine the "fair shares" shall take into account all relevant factors, including the risks to the environment. It is implied in all this that Government owes the owners of customary land and qoliqoli an in-trust duty to consult on these issues.

A legislation of increasing importance to the customary landowners is the Mining Act (Cap 146). Government has a duty to landowners arising from its management responsibilities for the issuance of licences for minerals extraction and for safeguarding the interests of landowners, such as ensuring no permanent damage to the natural environment and a clear indication as to who is responsible for the rehabilitation of mined out areas since current licences have not placed responsibility for this on the licence-holding foreign mining companies. The duty owed to the customary land owners is for Government to explain directly to them its policies on these aspects, and on the apportionment of mining royalties. There has been no specific legislation specifying the royalties-sharing formula. However, past Governments have, by executive policy, set this at 90 per cent for the customary landowners and 10 per cent to be retained by Government to cover its management costs. Consultation is important because many landowners have in the past been misled to believe that they own the minerals and not the State.

I shall end here. It has been a long presentation. However, it is my sincere hope that you have found it enlightening in informing you about the objective truth on the protection of indigenous rights to their customary lands and resources, and on what you can do as land and resource owners in establishing regular good faith consultative dialogue with Government. These annual consultations are to ensure that your collective interests are taken fully into account by Government when deciding its public policies on matters of direct interest to all indigenous land and resource owners.

Jioji Kotobalavu served as Permanent Secretary to four of Fiji's Prime Ministers: Ratu Sir Kamisese Mara, Major-General Sitiveni Rabuka, Mahendra Pal Chaudhry and Laisenia Qarase. He was also Fiji's first Ambassador to Japan, South Korea and the People's Republic of China.

He is a graduate of Auckland University with a Bachelor Arts and Master of Arts, and also of Oxford University's Foreign Service Programme. In retirement, he has completed the University of Fiji's School of Law programme for a Bachelor of Law degree. The information he uses in his Address to the Bose Ni Momo Trust is taken from a research thesis he wrote in completion of his LLB programme.

The views he expresses are his own and he takes full responsibility for them.